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IN THE
Supreme Court of the United States

CENTERIOR ENERGY CORPORATION, ET AL.,

Petitioners,

v.

JEROME R. MIKULSKI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of petitioners Centerior Energy Corporation, FirstEnergy Corporation, Cleveland Electric Illuminating Company, and the Toledo Edison Company is filed on behalf of the Chamber of Commerce of the United States of America ("Chamber").[1] The Chamber is the world's largest business federation. Its underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's members have a significant interest in the issue in this case. Under federal law, the Chamber's corporate members that pay a dividend to shareholders above a nominal sum are required to report to the Internal Revenue Service (IRS), and to individual shareholders, the amount of

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief. The parties have consented in writing to the filing of this brief.

the dividend distributed. *See* 26 U.S.C. § 6042(a)(1), (c). Several federal tax code provisions direct a corporation's calculation of corporate earnings and profits in connection with the reporting of dividends. The provision directly at issue in this case, 26 U.S.C. § 312(n)(1), establishes that interest expenses incurred in connection with certain construction loans cannot be deducted after the provision's effective date. The Chamber is concerned that the decision below allows state courts to adopt independent and inconsistent interpretations of Section 312(n)(1). The court's decision will directly affect members' compliance with federal revenue laws and the amount of tax revenue deposited into the United States Treasury.

The Chamber is also concerned about the broader implications of the Sixth Circuit's decision. The court of appeals read this Court's decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2127 (2006), a case involving a contract-based claim "ordinarily resolved in state courts," to pare back the longstanding jurisdiction of federal courts over cases that arise under statutes of the United States. This Court reaffirmed that jurisdiction only one year earlier in *Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), which held that federal courts have jurisdiction over state quiet title actions that implicate a federal tax provision governing the validity of the IRS's seizure of property. Under the Sixth Circuit's decision, the federal courthouse door is now closed to parties defending against state causes of action premised entirely on the alleged misinterpretation of federal

tax laws that the court determines in its "subjective view" are not important enough to require a federal forum. Pet. App. 33a.

The Chamber's members have a considerable interest in ensuring that the construction of federal tax law continues to be consistent, a goal that the decision below places in serious jeopardy. *Amicus* respectfully requests that this Court grant the petition and make clear that federal courts have jurisdiction over state causes of action that hinge on the interpretation of federal tax law, implicate the effective administration of the Internal Revenue Code, and closely resemble federal causes of action that must be brought in federal court.

STATEMENT

Respondents brought this suit for fraudulent misrepresentation and breach of contract in the Cuyahoga County (Ohio) Court of Common Pleas seeking to recover from petitioners taxes they claim they overpaid by virtue of petitioners' alleged misinterpretation of a provision of the Internal Revenue Code. In particular, respondents allege that petitioners intentionally misinterpreted the effective date provision of 26 U.S.C. § 312(n)(1), which prohibits the deduction of interest expenses on construction loans in "computing the earnings and profits of a corporation." *Id.* § 312(n)(1)(A)(i). Although petitioners' interpretation of the effective date increased their own tax liability, *see* Pet. App. 3a, respondents allege nevertheless that petitioners intentionally misinterpreted Section 312(n)(1) "in

order to make itself appear more profitable." *Id.*[2] Respondents further allege that they were injured by petitioners' alleged misinterpretation, which caused them to receive distributions from petitioners that were characterized as dividends rather than returns of capital and thereby increased respondents' tax liability. *Id.* at 14a-15a (comparing taxation of dividends to taxation of returns of capital); *see* 26 U.S.C. § 316(a) (defining "dividend" to mean "any distribution of property made by a corporation to its shareholders . . . out of its earnings and profits"). In paying their taxes in "1986 and all other relevant periods," Pet. App. 14a, respondents contend that they relied on that characterization to their detriment.

1. This case implicates many important aspects of the federal regime Congress has established for the administration of the Internal Revenue Code. As this Court explained long ago, "the United States have . . . enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete." *Cheatham v. United States*, 92 U.S. 85, 88 (1875). Under 26

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[2] Section 312 was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). Congress estimated that Section 312 would increase federal revenue by more than $1.2 billion in five years. *Staff of Joint Comm. on Taxation, 98th Cong., General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* 184 (Comm. Print 1984). Although Congress "anticipated that regulations will be issued" (*id.* at 177) to govern the application of Section 312(n)(1), the Treasury Department has not issued any such regulations.

U.S.C. § 7422, a taxpayer claiming to have overpaid its taxes cannot seek judicial relief "until a claim for refund or credit has been duly filed with the Secretary [of the Treasury]."[3] A taxpayer who complies with that administrative requirement and subsequently pursues judicial relief must bring such an action against the United States in the United States Court of Federal Claims or a United States District Court. *See id.* § 7422(e), (f)(1); 28 U.S.C. § 1346(a)(1). Taxpayers also have the option of challenging a tax before paying it by invoking the jurisdiction of the United States Tax Court. *See Hinck v. United States*, 127 S. Ct. 2011, 2016-17 (2007) (referring to the "structure of tax controversy jurisdiction, under which the Tax Court generally hears prepayment challenges to tax liability, while postpayment actions are brought in the district courts or the Court of Federal Claims") (internal quotation marks and citations omitted).

Congress has long sought to ensure a federal forum for the resolution of disputes arising under the federal tax laws. *See* 28 U.S.C. § 1340 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue[.]"); *Flora v. United States*, 357 U.S. 63, 67 n.8 (1958) (tracing history of Section 1340); 28 U.S.C. § 1346(a)(1) ("The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny

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[3] Congress has provided that "[e]xcept as otherwise expressly provided by law, the administration and enforcement of [Title 26] shall be performed by or under the supervision of the Secretary of the Treasury." 26 U.S.C. § 7801(a)(1).

civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected[.]"); *Flora*, 357 U.S. at 65-66 (tracing history of Section 1346(a)(1)).

Respondents did not pursue any of those traditional methods for obtaining relief, which would have invoked the exclusively federal system of "corrective justice." *See* Pet. App. 94(a) ("There is no question that plaintiffs could have raised this issue with the IRS, could have filed for a refund and could have pursued administrative remedies."). Instead, respondents chose to sue petitioners in state court under state law on the theory that petitioners caused them to overpay their taxes by filing with the IRS an information return that was based on a misinterpretation of Section 312(n)(1).

Under Section 6042 of the Code, corporations making dividend payments of $10 or more to any person in a calendar year "shall make a return according to the forms or regulations prescribed by the Secretary." 26 U.S.C. § 6042(a)(1). Section 6042 also requires information return filers such as petitioners to furnish to the dividend recipients an annual statement indicating the "aggregate amount of [the dividend] payments." *Id.* § 6042(c)(2).

In enacting the Code's information reporting requirements for dividend income, Congress repeatedly has recognized their important revenue-collection function.[4] The importance of those

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[4] For example, when Congress established the reporting requirements, the Senate Finance Committee observed that (continued...)

requirements is also reflected in Congress's decision to closely regulate the information reporting process. Congress has enacted both civil and criminal penalties for the failure to file correct information returns. *See* 26 U.S.C. §§ 6721(a),(e), 6722, 7203.

In 1996, Congress provided a federal cause of action for damages resulting from the willful filing of a fraudulent information return. 26 U.S.C. § 7434. That provision limits the damages that may be awarded to the "actual damages sustained by the plaintiff as a proximate result of the filing of the fraudulent information return," costs, and reasonable attorneys' fees. *Id.* § 7434(b). The law also contains a statute of limitations, *id.* § 7434(c), and a requirement that the IRS be served with a copy of the complaint, *id.* § 7434(d). In authorizing such a cause of action to combat information return filers who are "intent on either defrauding the IRS or harassing taxpayers," Congress cautioned that it did "not want to open the door to unwarranted or frivolous actions or abusive litigation practices" and emphasized that "actions brought under this section will be subject to Rule 11 of the Federal Rules of Civil Procedure, relating to the imposition of sanctions in the case of unfounded or frivolous claims." H.R. Rep. No. 104-506, at 35 (1996).

"the underreporting of dividends . . . on tax returns is a serious problem," *Senate Finance Comm. Rep. on the Revenue Act of 1962*, S. Rep. No. 87-1881, at 119 (1962), and the reporting requirements were "designed to decrease tax evasion (whether or not deliberate)," *id.* at 2.

2. Petitioners removed respondents' suit to federal district court, which ruled that removal was proper because respondents' state law causes of action "clearly require[] the construction and interpretation of the Internal Revenue Code, relevant Regulations, and Federal Law." Pet. App. 80a. The court also held that federal law "completely preempts" respondents' state-law claims. *Id.*

3. The Sixth Circuit ultimately heard the case en banc and held by an 8 to 5 vote that the federal district court lacked jurisdiction because respondents' claims do not arise under federal law. The court recognized that the merits of respondents' state law claims hinge on a disputed interpretation of a federal tax law. Pet. App. 31a ("[Respondents] concede that their claim will fail under [petitioners'] interpretation of [Section 312(n)(1)]."). The majority nevertheless ruled that "the federal interest in the present issue is not substantial." *Id.* The majority's analysis was shaped largely by its conclusion that this Court's decision in *Empire* requires that *Grable* "be read narrowly." *Id.* at 26a.

Five judges dissented from the majority's holding that federal jurisdiction was lacking. The dissent observed that "the federal interest in the interpretation of federal tax laws still remains not only substantial, but paramount." Pet. App. 45a.

SUMMARY OF ARGUMENT

This Court should grant review because the court of appeals' decision denies to defendants who report income on behalf of the IRS a federal forum for the resolution of a dispute over the proper interpretation of a federal statute that implicates the

information reporting system that Congress has established. Congress has enlisted private parties such as petitioners to assist the IRS in the collection of taxes by requiring them to file with the IRS information returns that identify payments of dividends made to shareholders. In carrying out their obligations under federal law, U.S. businesses "ought to be able to . . . resort to the experience, solicitude, and hope of uniformity that a federal forum offers." *Grable*, 545 U.S. at 312.

The court of appeals denied petitioners a federal forum based on its mistaken conclusion that this Court's decision in *Empire* restricted the circumstances in which a federal court may exercise jurisdiction over an action that hinges on a dispute over the meaning of a federal tax statute. *Empire* involved a "fact-bound dispute" about whether an insurer had a right under a federal contract to recover medical costs from the proceeds of the insured's state tort settlement, 126 S. Ct. at 2137. This Court did not address the circumstances presented here and did not alter the standard that it has long applied to cases like this one. Most recently, in its unanimous decision in *Grable*, the Court held that "the national interest in providing a federal forum for federal tax litigation" is "sufficiently substantial to support the exercise of federal question jurisdiction" over a state quiet title action. *Grable*, 545 U.S. at 310. Under *Grable* and its predecessors, federal jurisdiction clearly lies over this action because a federal forum is necessary to protect U.S. businesses from differing interpretations of a federal tax provision that they are required to

interpret in carrying out their information reporting obligations under federal law.

Contrary to the court of appeals' ruling, a decision recognizing federal jurisdiction in the circumstances presented here would not "impermissibly disrupt the congressionally approved balance of federal and state judicial responsibilities." Pet. App. 38a. In fact, it is the court of appeals' decision that frustrates Congress's demonstrated intent to establish a scheme of federal enforcement of the tax laws. *See* pp. 4-7, *supra*. Taxpayers claiming overpayment of their federal taxes may seek a refund only in federal court, and only after pursuing an administrative remedy before the IRS. Although respondents are suing petitioners and not the IRS, they are seeking a tax refund from petitioners and their claim implicates the same concerns that prompted Congress to impose strict limitations on—and federal control over—refund actions. This Court should grant review because the Sixth Circuit's decision closes the federal courthouse door to parties defending against putatively state causes of action that are, at bottom, third-party tax refund actions, and thus directly implicate the effective administration of the Internal Revenue Code. And this Court should reverse that decision because it effects a substantial retreat from the exercise of federal jurisdiction over cases arising under federal law that this Court has approved since Congress established federal-question jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Important To U.S. Businesses And The Federal Treasury.

The court of appeals' decision creates significant problems for U.S. business. If left unreviewed by this Court, the decision places businesses at risk of multiple decisions by state courts that conflict with each other and with decisions of federal courts. Moreover, the court of appeals' decision threatens the collection of federal tax revenues by giving businesses an incentive to take tax positions designed to minimize shareholders' liability in order to ward off class actions in state court. The court of appeals incorrectly downplayed the federal interest in the "private duties involved in [tax] collection." Pet. App. 32a. U.S. businesses play an integral role in assisting the IRS in collecting federal revenue through the information return reporting system. For these reasons, the Sixth Circuit erred in concluding that there is no substantial federal interest in this case.

A. The Sixth Circuit's Decision Creates Substantial Problems For U.S. Businesses.

Respondents allege that petitioners misinterpreted a provision of the Internal Revenue Code, 26 U.S.C. § 312(n)(1), to prohibit the deduction of certain interest expenses from corporate earnings and profits beginning in fiscal year 1985. As a result, respondents allege, the federal income tax

liability of petitioners' shareholders was overstated. Respondents could have sought a tax refund from the IRS, and could have challenged an adverse IRS determination in federal court. *See* 26 U.S.C. §§ 6511; 7422(a), (f)(1); Pet. App. 94a. Moreover, petitioners are subject to substantial penalties under federal law for failure to comply with the provisions of the Internal Revenue Code, including their information reporting obligations under Section 6042 that are affected by the construction of Section 312(n)(1). *See, e.g.*, 26 U.S.C. § 6721.

Rather than availing themselves of their remedies under federal law, respondents filed class action suits in state court alleging that petitioners' interpretation of Section 312(n)(1) amounted to a breach of contract and fraudulent misrepresentation. The Sixth Circuit recognized that respondents "have certainly staked their claim on this federal issue," and "the parties have crossed swords over it." Pet. App. 30a-31a (internal quotation marks omitted). The court of appeals nevertheless held that the federal courts lack subject-matter jurisdiction because, in the court's "subjective view," *id.* at 33a, the federal interest in the interpretation of "a relatively obscure provision of the tax code" (*id.* at 39a) was not "substantial" (*id.* at 32a), and because the exercise of jurisdiction would "impermissibly disrupt the congressionally approved balance of federal and state judicial responsibilities." *Id.* at 38a.

The Sixth Circuit's approach creates significant problems for U.S. business. Businesses report hundreds of billions of dollars in income every year to the IRS. For example, in 2005 alone,

businesses reported more than $166 billion in ordinary dividend income and more than $118 billion in qualified dividend income. *See* Selected Income and Tax Items for Selected Years, 2001-2005, http://www.irs.gov/pub/irs-soi/05intba.xls. Under the court's decision, a corporation's interpretation of federal tax laws or regulations is subject to challenge in the courts of all 50 states so long as the plaintiffs' claims are cloaked in the garb of state contract or tort law. State courts lack expertise in federal tax issues.[5] In addition, state courts may reach results that conflict with each other, as well as with federal courts and the IRS. The risk of conflicting state court decisions is particularly acute for businesses that operate on a multistate or nationwide basis. The court of appeals nevertheless held that federal

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[5] Some state courts refuse to resolve questions of federal tax law. *See, e.g., Tankovits v. Glessner*, 563 S.E.2d 810, 817 (W. Va. 2002) ("the lower court had no authority to require the trust to file, or not to file, any particular type of tax form or return" because "[i]t is beyond discussion that a [state] circuit court is without authority to address issues of federal tax law"); *Griffin v. Fraser*, 251 S.E.2d 650, 654 (N.C. Ct. App. 1979) (the "State's trial courts" are an "inappropriate[] . . . forum for construction of federal taxation statutes" because "[q]uestions of federal taxation are generally matters of substantial complexity, and the federal courts and the [IRS] have well established procedures for determining tax controversies and construing the meaning of federal tax statutes"); *Stands v. Weingrad*, 416 N.Y.S.2d 969, 972 (N.Y. Sup. Ct. 1979) (contrasting action that requires "a court [to] make a factual determination" under the Internal Revenue Code, over which a state court may exercise jurisdiction, and an action that "involve[s] the interpretation of complex Federal tax laws, rules or regulations," which "might properly be left to the Federal tribunals which have a familiarity and expertise with such matters").

courts are powerless to decide such cases, and therefore they must remain in state court.

The Sixth Circuit's decision places corporations in a dilemma. Before the Sixth Circuit's decision, corporations looked to the IRS and the federal courts to interpret federal tax law. As a result of the Sixth Circuit's decision, they must also consider the risk of class action lawsuits alleging that their interpretation of the Internal Revenue Code amounts to a tort or breach of contract under state law. The high cost of defending corporations against such actions, as well as the potential for large awards of damages (including punitive damages in some cases), will create an economic incentive for corporations to adopt tax positions that are calculated to minimize shareholder tax liability in order to discourage expensive and risky class action litigation.

There are many provisions of the Internal Revenue Code and its implementing regulations that could potentially be made the basis for state law actions alleging that, by misinterpreting federal tax law, the defendant has committed a tort or breached a contract. The Sixth Circuit's opinion holds that federal courts will lack jurisdiction in many if not all of these cases (to which a federal agency is unlikely to be a party), because "the federal government . . . has only a limited interest in private tort or contract litigation over the private duties involved in th[e] collection [of taxes]."[6] Pet. App.

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[6] As discussed *infra*, p. 16, that determination is fundamentally flawed.

32a. At a minimum, the Sixth Circuit's decision creates substantial uncertainty about whether federal courts have jurisdiction over any cases between private parties that hinge on the interpretation of provisions of the Internal Revenue Code and implicate the Code's effective administration. That uncertainty, in turn, provides an incentive for corporations to minimize their exposure to class action suits in state court, to the detriment of the federal fisc.

B. The Federal Government Has A Substantial Interest In A Federal Forum For The Interpretation Of Internal Revenue Code Provisions That Affect Federal Tax Revenues.

This Court recently recognized "the national interest in providing a federal forum for federal tax litigation." *Grable*, 545 U.S. at 310. Congress has required taxpayers who seek reimbursement for the overpayment of federal income taxes to first petition the IRS for administrative relief, *see* 26 U.S.C. § 7422(a), and has vested jurisdiction to review the IRS's decisions solely in the federal courts, *see id.* § 7422(f). Taxpayers seeking to challenge a notice of deficiency before paying the tax may petition the Tax Court. The tax enforcement regime adopted by Congress ensures that federal tax issues are channeled to expert decisionmakers and that federal revenue laws receive a uniform interpretation. The court of appeals' decision undermines those important goals by allowing plaintiffs to frame questions of federal tax law, including claims for reimbursement of federal income taxes, as questions

of state law that cannot be removed from state court to federal court.

The court of appeals minimized the importance of the federal interest at stake by observing that "[t]he government's ability to collect taxes from an individual shareholder or a corporation is not affected by the resolution of the dispute between these two [private] parties." Pet. App. 32a. That view is shortsighted. To be sure, the government will not have to refund respondents' money in the event they were to prevail in this action, but that is only because respondents are using state tort law to bring what is effectively a tax refund suit. Allowing the proliferation of litigation in the state courts over the interpretations of federal tax law rendered by an information return filer will have systemic effects on "the government's ability to collect taxes."[7] The tax system is "largely dependent on voluntary compliance." *U.S. v. Generes*, 405 U.S. 93, 104 (1972). If cases such as this one may be litigated in 50 different state courts, corporations will seek to reduce their risk of liability. As a result, corporations will have an incentive to adopt tax positions that minimize the tax liability of shareholders, employees, and others with whom they deal—at the expense of the federal Treasury.

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[7] Congress has demonstrated a substantial interest in the "private duties" (Pet. App. 32a) at issue in this case by enacting numerous provisions regulating the filing of information returns. *See* pp. 6-7, *supra*.

II. The Sixth Circuit's Decision Cannot Be Reconciled With This Court's Decisions On Federal-Question Jurisdiction.

This Court should grant the petition because the Sixth Circuit's decision represents a substantial scaling back of federal-question jurisdiction that the court justified by reference to this Court's decision in *Empire*. The court of appeals' reliance on that decision is misplaced. *Empire* involved a "fact-bound and situation specific" claim (126 S. Ct. at 2137) of "the sort ordinarily resolved in state courts" (*id.* at 2127)—and this Court did not purport to restrict the circumstances in which federal courts may exercise jurisdiction over claims that "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable*, 545 U.S. at 313 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)) (alterations in *Grable*). By mechanically applying "factors" that it derived from *Empire*, the court of appeals lost sight of the fact that respondents' action arises under federal law because it is wholly premised on a disputed interpretation of a federal tax provision, 26 U.S.C. § 312(n)(1), that implicates the sound administration of the Internal Revenue Code. The conflict between the court of appeals' approach and this Court's longstanding recognition of federal question jurisdiction in the circumstances presented here warrants this Court's review.

A. This Court's Decision In *Grable* Reaffirmed Federal Jurisdiction Over State Law Causes Of Action That Turn On A Substantial And Disputed Interpretation Of Federal Law.

This Court's unanimous holding in *Grable* reaffirmed—in a case implicating the administration of the federal tax laws—the longstanding rule that state law causes of action arise under federal law when they are premised on a "substantial" and "contested federal issue," *id.* at 313, and when their resolution by a federal forum "is consistent with congressional judgment about the sound division of labor between state and federal courts," *id.* In *Grable*, the Court applied that rule to a state quiet title action that the plaintiff premised on the theory that record title to the property, which the defendant had purchased from the IRS, was invalid because the manner in which the IRS had provided notice of the seizure to the plaintiff, the prior owner of the property, did not comport with 26 U.S.C. § 6335.

The defendant removed the case to district court under 28 U.S.C. § 1331 on the ground that it presented a substantial and disputed federal question—namely, whether the prior owner had received "notice" in the manner required by Section 6335—and therefore arose under federal law. *Grable*, 545 U.S. at 315. This Court agreed, holding that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court." *Id.* The Court elaborated that

the federal government "has a strong interest in the prompt and certain collection of delinquent taxes," as well as a "direct interest in the availability of a federal forum to vindicate its own administrative action." The Court further observed that private parties involved in such cases "may find it valuable to come before judges used to federal tax matters," *id.*, and that the exercise of federal jurisdiction would "portend only a microscopic effect on the federal-state division of labor," because state title cases would rarely "raise[] a contested matter of federal law." *Id.*

B. *Empire* Did Not Curtail Federal-Question Jurisdiction Reaffirmed In *Grable*.

This Court in *Empire* rejected federal jurisdiction over a claim by a health insurance carrier that administered a federal health insurance plan against the estate of a deceased employee covered by the plan. The decedent's estate had settled a state law tort claim against the parties alleged to have caused the decedent's injuries. *Empire*, 126 S. Ct. at 2129-30. The insurance carrier took no part in the state court action, but later it brought a claim in federal court against the estate for repayment of amounts it had paid for the decedent's medical care, on the ground that the reimbursement provision in the decedent's policy so required. In support of federal jurisdiction, the insurance carrier contended that federal common law governed its reimbursement claim, and alternatively that the federal health insurance plan itself constituted federal law. *Id.* at 2130.

In holding that the carrier's reimbursement action did not arise under federal law, the Court explained that claims "seeking recovery from the proceeds of state-court litigation" are "auxiliary claims" of "the sort ordinarily resolved in state courts." *Empire*, 126 S. Ct. at 2127. The Court observed that, in the absence of a conflict "between an identifiable federal policy or interest and the operation of state law," there was "no cause to displace state law, much less to lodge this case in federal court." *Id.* at 2132-33. The Court further noted that Congress had not created a federal cause of action enabling insurance carriers to sue plan beneficiaries for reimbursement, *id.*, and that, while Congress had expressly provided for federal jurisdiction over some contract-related actions, it had not so provided for the carrier's reimbursement claims, *id.*

Finally, the Court rejected an argument by the United States that the case was governed by *Grable*. The Court explained that *Empire* was "poles apart" from *Grable*, which "presented a nearly pure issue of law," namely, "the interpretation of a federal statutory provision . . . of the Internal Revenue Code," and "centered on the action of a federal agency (IRS) and its compatibility with a federal statute." *Empire*, 126 S. Ct. at 2137 (citing *Grable*). *Empire*, by contrast, involved a "fact-bound, situation specific" claim triggered "by the settlement of a personal-injury action launched in state court," whose resolution depended not on "a context-free inquiry into the meaning of a federal law," but rather on a "fact-specific application of rules that come from both federal and state law." *Bennett v. Southwest*

Airlines Co., 484 F.3d 907, 910 (7th Cir. 2007) (Easterbrook, C.J.) (contrasting *Grable* and *Empire*).

In distinguishing *Grable* and rejecting the United States' reliance on that decision, the Court in *Empire* did not purport to establish a more restrictive test for federal jurisdiction than the Court applied in *Grable* to the "classic" situation in which "federal-question jurisdiction [is] predicated on the centrality of a federal issue." *Empire*, 126 S. Ct. at 2136 n.5. By mechanically applying four "factors" derived from *Empire's* treatment of *Grable*, the Sixth Circuit departed from a line of this Court's cases culminating in *Grable* and eliminated federal-question jurisdiction over ostensibly state law causes of action that implicate the effective administration of the Internal Revenue Code.

C. The Sixth Circuit's Approach Eliminates Federal Question Jurisdiction In Cases In Which This Court's Precedents Call For Its Exercise.

In rejecting federal jurisdiction here, the Sixth Circuit concluded that the explanations this Court provided in *Empire* for distinguishing *Grable* define the universe of circumstances in which the federal interest in the resolution of a disputed question of federal law is sufficiently "substantial" to invoke the jurisdiction of the federal courts. For example, the court of appeals reasoned that the federal interest in this case is not substantial because the federal question implicates "private duties involved in [tax] collection" and not the IRS's own compliance with federal law. Pet. App. 32a. But, as discussed above,

the federal interest in the role private parties such as petitioners play in assisting the IRS in collecting revenue undoubtedly is substantial. Moreover, the court of appeals' "subjective view" (*id.* at 33a) that the federal government would not find the question presented in this case "particularly important" represents an ad hoc approach to federal-question jurisdiction that this Court should reject. Although this Court has recognized that there is no "single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims," *Grable*, 545 U.S. at 314, that acknowledgment does not permit courts to create uncertainty by employing a self-acknowledged, highly subjective approach (Pet. App. 33a) when a clear answer exists.

Here, the answer is clear and can be found in congressional intent. Congress long ago created a federal cause of action for a refund that may be sought only in federal court and only after the taxpayer exhausts an exclusively federal administrative remedy. Respondents, who concede that the damages they seek are measured by the amount by which they claim to have overpaid their taxes, could have obtained the relief they now seek by invoking the refund scheme. Even assuming that respondents' current causes of action are distinct from a refund suit by virtue of their pursuing recovery against petitioners rather than the IRS, their action closely resembles a refund suit.

Indeed, several courts of appeals have held in circumstances analogous to those presented here that state law actions seeking to recover money from airlines that, in their role as tax collection agents for the IRS, mistakenly collected an excise tax on

domestic air transportation, were barred by the federal refund statute. *See Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, *amended by* 140 F.3d 849 (9th Cir. 1998); *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (5th Cir.), *cert. denied*, 552 U.S. 950 (1997); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349 (7th Cir.), *cert. denied*, 552 U.S. 949 (1997). Given that respondents' action closely resembles an action over which Congress intended the federal courts to exercise exclusive jurisdiction, the Sixth Circuit's decision to *preclude* federal jurisdiction does not reflect the "'sensitive judgment[] about congressional intent' that § 1331 requires." *Grable*, 545 U.S. at 317 (quoting *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810 (1986)); *see id.* (observing that the existence of a federal cause of action to vindicate the underlying right is "a sufficient condition for federal-question jurisdiction") (footnote omitted).[8]

Finally, the court of appeals' concern that recognizing federal jurisdiction here would portend a flood of federal litigation involving "common

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[8] More recently, Congress has created a federal cause of action for the willful filing of a fraudulent information return. *See* 26 U.S.C. § 7434. Although that cause of action apparently was unavailable to respondents for the tax years in question, Congress's decision to authorize such federal actions is relevant in determining whether permitting federal courts to exercise jurisdiction today over an analogous state law claim would be consistent with congressional intent. Congress's concern about taxpayers abusing the cause of action against an information return filer, *see* p. 7, *supra*, provides further support for the conclusion that precluding federal jurisdiction in this case frustrates congressional intent.

malpractice actions against tax preparation professionals" and "actions by employees for overstatement of earnings on W-2 forms" is misplaced. Malpractice actions do not typically hinge on "disputed interpretations of tax code provisions" and, even where they do, the exercise of federal jurisdiction could be rejected on the ground that Congress has not manifested an intent to have federal courts resolve state malpractice actions that have no federal analog (in circumstances in which, unlike here, the taxpayer is not seeking a refund). As for actions against other categories of information return filers such as employers, such claims are more likely to be premised on clerical or factual mistakes than misinterpretations of federal tax law.[9] For the category of those cases that hinge on a disputed interpretation of federal tax law, federal jurisdiction would be proper for the same reasons that it is in this case.

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[9] *See Clemens v. USV Pharm.*, 838 F.2d 1389, 1395 (5th Cir. 1988) (company that filed erroneous information return liable for negligently failing to correct erroneous W-2); *Buchanan v. Dowdy*, 772 F. Supp. 968, 972-74 (S.D. Tex. 1991) (defendant negligent in failing to correct erroneous Form 1099); *Wisecup v. Gulf Dev.*, 565 N.E.2d 865, 866 (Ohio Ct. App. 1989) (plaintiff alleged defendant "negligent and careless" in misreporting his earned income).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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